Reichenbach Ceiling & Partition Co. *and* Local 16, Operative Plasterers' and Cement Masons' International Association of the United States and Canada and Local 9, International Union of Bricklayers and Allied Craftworkers, AFL–CIO. Case 7–RC–21935

December 20, 2001

DECISION ON REVIEW

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On March 23, 2001, the Acting Regional Director for Region 7 issued a Decision and Order (relevant portions of which are attached as an appendix). Thereafter, in accordance with Section 102.67 of the National Labor Relation Board's Rules and Regulations, the Petitioner filed a timely request for review of the Acting Regional Director's decision and the Intervenor filed an opposition. By Order dated July 18, 2001, the Board granted the Petitioner's request for review. The Intervenor filed a brief on review.

Having carefully considered the entire record, including the Intervenor's brief on review, with respect to the issue of whether the Employer and the Intervenor entered into a 9(a) bargaining relationship, the Board has decided to affirm the Acting Regional Director's decision.[1] Having found a 9(a) relationship, the Board further affirms the Acting Regional Director's determination that the present petition is barred and thus should be dismissed.[2]

Dated, Washington, D.C. December 20, 2001

Peter J. Hurtgen, Chairman

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN HURTGEN, concurring.

I agree that the agreement here contains language, which establishes a 9(a) relationship. However, in my view, that agreement and language are binding only on the parties thereto. The Petitioner is not a party thereto. Accordingly, if the petition had been filed within 6 months of the recognition, the Petitioner would have been free to assert that such recognition was not majority-based. However, inasmuch as the petition was filed more than 6 months after the recognition, such an assertion is untimely. A contrary view would mean that stable relationships, assertedly based on Section 9(a), would be vulnerable to attack based on stale evidence. That is not permitted with respect to unions in nonconstruction industries.[3] And, under *John Deklewa & Sons*, 282 NLRB 1375 fn. 53 (1987), unions in the construction industry are not to be treated less favorably than unions in nonconstruction industries. Thus, such an attack should not be permitted with respect to unions in the construction industry. Accordingly, I concur that the petition should be dismissed.

Dated, Washington, D.C. December 20, 2001

Peter J. Hurtgen, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, hereinafter referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,[2] the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.[3]

[1] *Central Illinois Construction*, 335 NLRB No. 59 (2001).

[2] *VFL Technology Corp.*, 329 NLRB No. 49 (1999) (reiterating the Board's policy that "a 9(a) contract will bar any petition filed outside the window period of that contract").

[3] *Machinists Local 1424 (Bryan Mfg. Co.) v. NLRB.*, 362 U.S. 411 (1960); *S. L. Wyandanch Corp*., 208 NLRB 883 (1974).

[2] The parties filed briefs, which were carefully considered.

[3] The Employer did not participate in the hearing held on February 23, 2001, and therefore, the parties were unable to stipulate to the Employer's activity in commerce. The record establishes that on February 6, 2001, the Employer was sent a letter pursuant to *Tropicana Products, Inc.*, 122 NLRB 121 (1959), stating that unless it informed the Regional Office otherwise, the Board would assert jurisdiction over the Employer in this matter. Gregory Brisboy, business agent for Petitioner, testified that within calendar year 2000 the Employer performed at least

3. The labor organizations involved herein claim to represent certain employees of the Employer.

4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

5. The Petitioner and Intervenor agree that the appropriate unit for bargaining consists of all plasterers employed by the Employer within the State of Michigan, excluding the counties of Wayne, Oakland, Macomb, and Monroe. Petitioner, Plasterers Local 16 (hereinafter Petitioner), filed the instant petition on December 28, 2000, requesting certification of representative in a bargaining unit comprised of the Employer's approximately 12 current plasterer employees. During the past 2 years, the Employer's workforce has fluctuated between 13 and 20 plasterers. Bricklayers Local 9 (hereinafter Intervenor), asserts that the Employer is bound to a collective-bargaining agreement with the Intervenor effective from June 22, 2000 through August 1, 2003, covering plasterers, which bars the instant petition and requires its dismissal.

The Employer is a wall and ceiling contractor owned by James Reichenbach that primarily builds interior walls and installs suspended ceilings. The Petitioner and Employer were parties to a 8(f) collective-bargaining agreement covering unit employees effective from June 1, 1998 through May 31, 2000, and have had a collective-bargaining relationship since 1945. By a memorandum of understanding dated November 8, 2000, the Petitioner and Employer agreed to abide by the terms of 2000–2002 collective-bargaining agreement between the Petitioner and the Lansing, Jackson Area Plastering Contractors.[4] The contract is limited to plasterers employed within the Michigan geographic areas of Clinton, Eaton, Jackson, and Ingham Counties, the northwestern portion of Livingston County, including the townships of Conway, Cococtah, Handy, and Howell, and the city of Howell.

The Intervenor was party to a collective-bargaining agreement effective from June 22, 1997 through June 21, 2000, with a multiemployer association, the Michigan Council of Employers of Bricklayers & Allied Craftworkers (hereinafter the MCE). Although the Employer is not a member of MCE, it agreed to be bound to the contract for its unit employees on September 29, 1998, by virtue of James Reichenbach's execution of the 1997–2000 contract as a non-association member. The Employer did not serve notice to terminate or to withdraw from the 1997–2000 contract prior to its expiration. Consequently, according to the roll-over provision of the contract, the Employer became bound to a successor agreement between the Intervenor and MCE, effective from June 22, 2000 to August 1, 2003. The geographic coverage of the contract is the entire State of Michigan, but excluding the southeast counties of Wayne, Oakland, Macomb, and Monroe. Both the expired contract and successor 2000–2003 contract include the following language:

> The Employer, which is a Section 9(a) Employer within the meaning of the National Labor Relations Act, hereby recognizes and acknowledges that the Union is the exclusive representative of all of its Employees in the classifications of work falling within the jurisdiction of the Union, as defined in Article II of this Agreement, for the purpose of collective bargaining.
>
> The Union has submitted to the Employer evidence of majority support, and the Employer is satisfied that the Union represents a majority of the Employer's Employees in the bargaining unit described in the current collective-bargaining agreement between the Union and the Employer.
>
> The Employer therefore voluntarily agrees to recognize the Union as the exclusive bargaining representative of all Employees in the contractually described bargaining unit on all present and future jobsites within the jurisdiction of the Union, unless and until such time the Union loses its status as the Employees' exclusive representative as a result of a NLRB election requested by the Employees.
>
> The Employer and the Union acknowledge that they have a 9(a) relationship as defined under the National Labor Relations Act and that this Recognition Agreement confirms the on-going obligation of both parties to engage in collective bargaining in good faith.

Despite not specifically agreeing to be bound to the 2000–2003 contract, the Employer is making contributions to the Intervenor's fringe benefit fund and paying wages to plasterers in accordance with its terms.

As the Intervenor's current contract covers the petitioned-for unit, if its bargaining relationship is controlled by Section 9(a) of the Act, the contract will bar the instant petition. In the construction industry, parties may create a bargaining relationship pursuant to either Sections 9(a) or 8(f) of the Act. In the absence of evidence to the contrary, the Board presumes that the parties intend their relationship to be governed by Section 8(f), rather than Section 9(a), and imposes the burden of proving the existence of a 9(a) relationship on the party asserting that such a relationship exists. *H.Y. Floors & Gameline Painting*, 331 NLRB No. 44 (2000); *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d. Cir. 1988), cert. denied 488 U.S. 889 (1988). To establish voluntary recognition in the construction industry pursuant to Section 9(a), the Board requires evidence that the union (1) unequivocally demanded recognition as the employees' Section 9(a) representative, and (2) that the Employer unequivocally accepted it as such. *H.Y. Floors & Gameline Painting*, 331 NLRB slip op. at 1. The Board also requires a contemporaneous showing of majority support by the union at the time 9(a) recognition is granted. *Golden West Electric*, 307

$100,000 worth of services for Michigan State University and at least $50,000 in services for Barton-Malow, both of whom I take administrative notice are directly engaged in interstate commerce. Accordingly, I find that it is appropriate to assert jurisdiction over the Employer for purposes of the instant matter. *Tropicana Products*, supra.

[4] Despite the 9(a) language contained in the memorandum of understanding, Petitioner does not assert that it has a Section 9(a) bargaining relationship with the Employer.

NLRB 1494, 1495 (1992). However, as to this contemporaneous showing the Board has held that an employer's acknowledgement of such majority support is sufficient to preclude a challenge to majority status. *H.Y. Floors & Gameline Painting*, supra; *Oklahoma Installation Co.*, 325 NLRB 741 (1998). Moreover, the Board has held that a challenge to majority status must be made within a 6-month period after the grant of 9(a) recognition. *Casale Industries*, 311 NLRB 951 (1993).

I find that the Employer's agreement on September 29, 1998, to be bound as a non-association member to the MCE contract constituted an unequivocal acceptance of the Intervenor's unequivocal demand for recognition as the petitioned-for unit employees' 9(a) representative.[5] As part of that agreement to be bound, the Employer clearly acknowledged that the Intervenor had submitted to the Employer evidence of majority support and that the Employer was satisfied that the Intervenor represented a majority of its unit employees. Accordingly, as of September 29, 1998, the Intervenor was the exclusive collective bargaining representative of the Employer's employees pursuant to Section 9(a) of the Act.

Since any challenge to the Intervenor's 9(a) status must have been made within the 6-month period following September 29, 1998, and the Petitioner did not challenge the Intervenor's majority status until the filing of the instant petition on December 28, 2000, over 2 years after the Intervenor gained 9(a) status and at least 6 months after the current contract became effective, the instant petition is barred and must be dismissed.[6]

It is ordered, based on the foregoing and the entire record, that the petition is dismissed.[7]

Dated at Detroit, Michigan, this 23rd day of March 2001

[5] Petitioner argues that the document signed by Reichenbach on September 29, 1998, did not include 9(a) language. Although this is accurate, the document states that Reichenbach read and agreed "to be bound by all the terms and conditions set forth in the foregoing agreement," and there is no evidence that Reichenbach did not understand the significance of the contractual 9(a) language as recited above.

[6] Even if Petitioner's challenge to the Intervenor's majority status had been timely, I note that Petitioner submitted no evidence to rebut the Intervenor's majority status, either at the time of recognition or at any time since. The mere filing of a petition by the Petitioner does not itself challenge the Intervenor's majority status.

[7] Under the provisions of the Board's Rules and Regulations, a request for review of this Decision and Order may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by April 6, 2001.